STATEMENT OF THOMAS B. HEFFELFINGER

BEFORE THE

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

CONCERNING LAW ENFORCEMENT IN INDIAN COUNTRY

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Mr. Chairman and members of the Committee, my name is Thomas B. Heffelfinger and I am a partner with the law firm of Best & Flanagan LLP in Minneapolis where, among other things, I represent tribal communities. From 2001 to March 2006, I was United States Attorney for the District of Minnesota and also the Chair of the Department's Native American Issues Subcommittee ("NAIS"). In that capacity, I had the honor of testifying before this Committee three times, twice on issues related to criminal jurisdiction in Indian Country.

In March 2004, as Chair of NAIS, I had the privilege to participate in a listening session put together by the National Congress of American Indians ("NCAI") with tribal leaders from around the country on the issues of criminal jurisdiction in Indian Country. At that meeting, Chairpah Matheson, Tribal Councilmember of Coeur d'Alene Tribe of Idaho, asked: "How can tribes have sovereignty when they can't protect their children and their women?" Mr. Matheson's quotation is incredibly compelling. Is there any higher priority for any government – federal, state, tribal or local – than protecting the physical safety of its people?

Mr. Matheson's concerns are very real. In a Coeur d'Alene Tribal survey conducted only months before our March 2004 meeting, 81 percent of Coeur d'Alene members did not feel safe in their own homes. Nationally, Native Americans continue to be victimized by crime at a rate two and one-half times the national average. Native American children suffer from neglect and abuse at a rate three times the national average. Native American women, the most heavily victimized segment of our nation, are victimized by sexual assault and domestic violence at a rate more than three times the national average. This was confirmed only recently by the findings of an Amnesty International study.

To add to this concern with victimization, the perpetrators in these reservation crimes are largely Native American, meaning that a disproportionate number of Native Americans are going to prison. For example, in Minnesota, when nine of eleven tribes are Public Law 280 ("PL 280) (state jurisdiction) tribes, the Native American state prison population is seven times the state general population.

This is a tragedy; these victims, these defendants, are the tribal leaders of tomorrow.

This is also a federal problem. These tribal members live either on reservations for which the federal government has jurisdiction for major crimes or they live on reservations for which the state has jurisdiction pursuant to PL 280, which is itself a federal law.

Federal Indian law is a result of 122 years of Supreme Court decisions and congressional actions; there has been no comprehensive plan for Indian Country

criminal law and it is a patchwork quilt of decisions and stop-gap legislation that few understand. Every action of Congress or the Supreme Court only makes the law of federal criminal jurisdiction more complicated and more difficult to understand and use.

Since 1885, when Congress passed the Major Crimes Act,[1] the United States government has had primary responsibility for the investigation and prosecution of serious violent crime in Indian Country, such as murder, manslaughter, kidnapping, arson, burglary, robbery and child sexual abuse. However, federal jurisdiction under this statute is limited to the prosecution of Indians only. The Indian Country Crimes Act,[2] which is also known as the General Crimes Act, gives the United States jurisdiction to prosecute all federal offenses in Indian Country except when the suspect and the victim are both Indian, where the suspect has already been convicted in tribal court or in the case of offenses where exclusive jurisdiction over an offense has been retained by the tribe by way of treaty.

The United States Supreme Court has held that where the suspect and the victim are both non-Indian, then the state court has exclusive criminal jurisdiction.[3] Under the Indian Civil Rights Act, tribal courts have criminal jurisdiction over non-member Indians;[4] however, tribal court sentences are limited to misdemeanor punishments.[5] In the 1978 decision of Oliphant v. Suquamish Tribe,[6] the United States

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[1] Now codified at 18 U.S.C. § 1153.
[2] 18 U.S.C. § 1152.
[3] Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1882).
[4] 25 U.S.C. § 1301(2) & (4).
[5] 25 U.S.C. § 1302(7).

Supreme Court decided that tribal courts could not exercise criminal jurisdiction over non-Indians.

The Oliphant decision in particular has had a profoundly detrimental impact upon public safety in Indian Country because it limits the authority of local tribal law enforcement in the event a non-Indian is suspected of committing a crime in Indian Country. This is an everyday challenge when police are responding to domestic violence, as 70 percent of domestic assaults upon Native Americans are committed by non-Indians. In response to Oliphant's constraints, some tribal law enforcement agencies have obtained "cross-commissions" from state, local or federal authorities to expand their authority to arrest non-Indian criminal suspects under state or federal law. However, such cooperative arrangements are not made in many jurisdictions due to various factors, including local political issues and concerns over liability. As a result, effective law enforcement over non-Indians who commit crimes in Indian Country is not consistent from reservation to reservation.

Confusion over criminal jurisdiction for criminal offenses committed in Indian Country is very real and has a significant, negative impact upon the ability of law enforcement and prosecutors to protect the public. Whenever a violent crime occurs in Indian Country, in order to determine jurisdiction, prosecutors are forced to make a determination concerning who has jurisdiction by answering four questions:

(1) whether the offense occurred within "Indian Country;"

(2) whether the suspect is an Indian or a non-Indian;

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[6] 435 U.S. 191 (1978).

(3) whether the victim is an Indian or a non-Indian; and

(4) what the nature of the offense is.

Depending on the answers to these questions, an offense may end up being prosecuted in tribal court, federal court, state court or not at all.

Determining whether or not the offense occurred in Indian Country is not a simple question. Although "Indian Country" is defined as land that is either: (1) within a reservation; (2) within a dependent Indian community; or (3) an allotment,[7] litigation over whether or not a particular crime scene is within Indian Country can tie up litigation for years. For example, the Indian Country status of certain lands within the Uintah & Ouray Ute Tribe's reservation in Utah took approximately 25 years to litigate,[8] throwing many convictions of violent criminals into doubt until it was eventually resolved in a manner supporting the convictions.[9]

Another complicating factor is the fact that both the federal Major Crimes Act and the General Crime Act require proof of "Indian" race of either the victim, the offender or both. Nevertheless, "Indian" is not defined in Title 18. At least one federal circuit, the Tenth, now requires the government to prove the non-Indian status of either the victim or the defendant in order to establish jurisdiction under the General Crimes Act. U.S. v. Prentiss, 273 F.3d 1277 (10th Cir. 2001). Why is race a required

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[7] 18 U.S.C. § 1151.

[8] Ute Indian Tribe v. Utah, 114F.3d 1513 (10th Cir. 1997), cert. denied, Duchesne County v. Ute Indian Tribe, 522 U.S. 1107 (1998), applying the decision of Hagen v. Utah, 510 U.S. 399 (1994), reh. Denied, 511 U.S. 1047 (1994).

[9] U.S. v. Cuch, 79 F.3d 987 (10th Cir. 1996).

element for public safety in Indian Country? The only area of federal criminal jurisprudence where race is an essential element is in the area of Indian criminal law.

Answering these questions adds to the delay, complexity and difficulty of the investigation and prosecution. Only after these questions are answered can a prosecutor turn to the more important questions of sufficiency of the evidence and guilt or innocence. This confusion over jurisdiction generally does not exist in consideration of jurisdiction in most state and federal violent criminal cases where jurisdiction/venue are determined by the geographic position of the crime scene.

Jurisdictional confusion has an additional detrimental impact upon a factor crucial to protecting public safety in Indian Country: cooperation between tribal, state and federal law enforcement. Because of the isolated nature of most reservations, the time and distances required to respond and the scarcity of resources, multi-jurisdictional law enforcement cooperation is essential. Unfortunately, confusion over jurisdiction all too often results in "turf battles" or, even worse, unwillingness to assume responsibility. The losers in these disputes are the victims.

One hundred and twenty-plus years of court decisions and stop-gap legislation have created a jurisdictional mess, which means that law enforcement is difficult, delay is normal and respect for law enforcement and judicial process is low. The losers are the people of Indian Country.

If the federal government is going to fulfill its trust obligations and protect the people of Indian Country, we must clarify and simplify Indian Country criminal jurisdiction. This effort must respect and protect tribal sovereignty. This effort must

be comprehensive and look at all of Indian Country criminal jurisdiction. It requires a "step back" and new look at how to address Indian Country criminal jurisdiction. Reliance on individual judicial decisions and stop-gap legislative "fixes" will not improve the quality of law enforcement in Indian Country.

Senators, in 2002 and 2003, as a government representative, I also recommended to you the need for a comprehensive clarification and simplification of Indian Country criminal jurisdiction. As a government representative, I did not suggest to you how to accomplish such a clarification of the law. Now I am a private citizen and am free to make a suggestion.

Clarifying a body of law that has never been comprehensively studied and clarified will not be an easy task. It will take leadership with "clout," both here in Washington and in Indian Country. Quite frankly, the Department of Justice lacks the structure and the resolve in this area to provide that leadership. I have thought about this for more than five years and am convinced there is only one option: Congress must establish a Congressional Indian Country Criminal Jurisdiction Commission ("Commission") to study the issues and report back to Congress. With Congress' leadership, the Commission will have clout. With a broad-based membership – tribal representatives, prosecutors, defense lawyers, judges, professors and other interested parties – it is very possible to develop a body of law that will be accepted by all interested groups and will remove confusion and improve public safety.

I was initially reluctant to recommend yet another Commission whose work might disappear into the vast mountain of paper generated by the federal government.

But I have become convinced that only a Congressionally-supervised and monitored group of experts and interested individuals can realistically meet this challenge. This Commission will require funding to cover travel expenses so that all members will be able to fully participate. It will require Congressional staff support, not only for administrative assistance, but also to keep Congress fully informed. And, it will require regular reports to Congress in order to keep the Commission on task.

The Commission's mission should be broad and all jurisdiction-related issues should be "on the table" in order to achieve a comprehensive clarification of the law. The issues could include:

- Is jurisdiction based on geography? What is the definition of Indian Country?
- What role, if any, should race play?
- What do we do with the Major Crimes Act and the General Crimes Act? Should jurisdiction be based on a list of crimes?
- What do we do with PL 280 and other specific grants of jurisdiction to states?
- How do we deal with non-Indians on non-Indian crimes on the reservation?
- Should there be an establishment of tribal jurisdiction over non-Indians? (I am among those who believe that such an "Oliphant fix" is essential to

improving public safety in Indian Country. However, such a fix must be part of a larger, comprehensive clarification of the law.)

- In clarifying and simplifying criminal jurisdiction, will it be necessary to expand the civil rights of those appearing before tribal courts; e.g., right to indigent counsel, right to jury pool which is a true cross-section of the entire community, right to appeal beyond tribal review?
- How do we deal with the financial and resource impact of re-adjusting responsibility; .e.g., burdens on tribal, state and federal law enforcement and judiciary?

While I was in the Department of Justice, I attempted to establish a task force to accomplish the clarification and simplification I now suggest. For a variety of reasons, I was unsuccessful. That experience convinced me that without Congressional leadership, there will be no comprehensive reform of Indian Country criminal jurisdiction. Unless we achieve such a comprehensive clarification and simplification, we will not be able to significantly improve our ability to protect the people of Indian Country from serious crimes. Continued isolated judicial decisions and legislative "fixes" simply will not do the job.

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